

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Petition of The Empire)
District Electric Company d/b/a Liberty to)
Obtain a Financing Order that Authorizes) Case No. EO-2022-0040
the Issuance of Securitized Utility Tariff)
Bonds for Qualified Extraordinary Costs)

In the Matter of the Petition of The Empire)
District Electric Company d/b/a Liberty to)
Obtain a Financing Order that Authorizes) Case No. EO-2022-0193
the Issuance of Securitized Utility Tariff)
Bonds for Energy Transition Costs Related)
to the Asbury Plant)

PUBLIC COUNSEL’S APPLICATION FOR REHEARING

COMES NOW the Office of Public Counsel (Public Counsel) and applies to the Commission to rehear the following matters that it determined in its August 18, 2022, *Financing Order* in these above-captioned cases.¹

Asbury Abandonment Tax Deductions

1. First, the Commission’s decision not to offset Liberty’s “pretax costs” of Asbury by the 2019 and 2020 income tax deduction Liberty realized from its losses on abandonment of Asbury which §393.1700.1(7)(a), RSMo., requires is unlawful and unreasonable. That decision appears in the Commission’s *Financing Order* under **Issue 3)N) “SHOULD LIBERTY’S RECOVERY REFLECT A DISALLOWANCE FOR INCOME TAX DEDUCTIONS FOR ASBURY ABANDONMENT?”** where the Commission made the following findings and conclusions found on pages 63-64 of that *Order* (Footnotes omitted.):

Findings of Fact

141. Public Counsel asserts that Liberty has enjoyed a tax benefit because it wrote-off Asbury in 2020 and the last three months of 2019. Public Counsel asserts this is a benefit directly associated with the retirement of Asbury and should be included

¹ §393.700.2(3)(a)c, and §386.500.1, RSMo.

in the AAO totals established to track the costs associated with that retirement. Public Counsel calculated a tax benefit of \$16.5 million, which it applied to the AAO liability.

142. This tax benefit is a normal timing item that is treated the same as any ADIT item in rates. A regulatory asset was established for the net book value of Asbury. This regulatory asset has deferred taxes associated with it. As this regulatory asset gets amortized, the amortization expense is added back for taxable income purposes with no corresponding tax deduction because Asbury qualified as an abandonment for tax purposes already.

Conclusions of Law

PP. Section 393.1700.2(3)(c)m requires a financing order to include:
[A] procedure for the treatment of accumulated deferred income taxes and excess deferred income taxes in connection with the retired or abandoned or to be retired or abandoned electric generating facility, or in connection with retired or abandoned facilities included in qualified extraordinary costs. The accumulated deferred income taxes, including excess deferred income taxes, shall be excluded from rate base in future general rate cases and the net tax benefits relating to amounts that will be recovered through the issuance of securitized utility tariff bonds shall be credited to retail customers by reducing the amount of such securitized utility tariff bonds that could otherwise be issued. The customer credit shall include the net present value of the tax benefits, calculated using a discount rate equal to the expected interest rate of the securitized utility tariff bonds, for the estimated accumulated and excess deferred income taxes at the time of securitization including timing differences created by the issuance of securitized utility tariff bonds amortized over the period of the bonds multiplied by the expected interest rate on such securitized utility tariff bonds.

Decision

Public Counsel's proposed disallowance for income tax deductions for Asbury abandonment is unnecessary and will not be imposed.

The Commission found that Liberty realized income tax deductions in tax years 2019 and 2020 associated with its abandonment of Asbury that were "a normal timing item that is treated the same as any ADIT item in rates," but then, unlawfully and unreasonably, ignored or overlooked the §393.1700.1(7)(a), RSMo, requirement in the definition of "energy transition costs" that "applicable tax benefits of accumulated and excess deferred income taxes" reduce the "pretax costs" of qualifying retired or abandoned plant, and unlawfully failed to offset the pretax costs

Liberty incurred for Asbury by the \$16.5 million of accumulated deferred income taxes associated with its retirement and abandonment of Asbury.

Asbury Storm Loss Tax Deduction

2. Second, the Commission’s decision not to offset Liberty’s Winter Storm Uri fuel and purchased power costs by Liberty’s 2021 income tax deduction Liberty accrued for its Winter Storm Uri losses and which, with its 2021 tax liability, became due (known and measurable) as of April 18, 2022, although, with a six-month extension, not payable until October 17, 2022, is unreasonable. That decision appears in the Commission’s *Financing Order* under **Issue 2)H) “Should Liberty’s recovery reflect a disallowance for income tax deductions for Winter Storm Uri costs?”** where the Commission made the following findings and conclusions found on pages 33-35 of its *Financing Order* (Footnotes omitted.):

Findings of Fact

52. Public Counsel asserts that Liberty expects to claim a Missouri jurisdictional tax deduction of \$204,500,939 on the 2021 consolidated income tax return, resulting in a tax savings due to the Winter Storm Uri loss of \$48,753,024. Public Counsel would gross that amount up to \$64,012,720 and add carrying charges to bring the total reduction to \$68,346,382.71 Public Counsel argues this tax benefit should be recognized as a reduction in the amount of securitization.

53. Public Counsel incorrectly asserts that the proceeds Liberty will receive from the securitization bonds are not taxable, so the company will be compensated, yet still enjoy a tax break for the loss. In fact, the charges that will be used to pay the bonds is taxed as income to the utility. Public Counsel’s witness acknowledged that fact in his testimony at the hearing.

54. The tax treatment of Winter Storm Uri losses may create a tax timing issue that will result in an adjustment of Accumulate Deferred Income Tax (ADIT) as an offset to Liberty’s rate base. Customers do not receive the recorded amount of the ADIT liability, instead, they benefit because ADIT liability reduces rate base and customers are charged a lower revenue requirement reflecting the lower cost of capital.

Conclusions of Law

W. Public Counsel's witness cites two provisions of the securitization statute to support his suggestion to use Liberty's asserted tax deduction as an offset to the amount to be securitized for Qualified Extraordinary Costs related to Winter Storm Uri. First, he cites the definition of "Energy Transition Costs" in Section 393.1700.1(7), RSMo, which includes some provisions relating to tax benefits of accumulated and excess deferred income taxes. However, the Winter Storm Uri costs are Qualified Extraordinary Cost, not Energy Transition Costs, and the definition of such costs, found at Section 393.1700.1(13), RSMo, contains no provisions regarding income taxes.

X. Public Counsel's witness also cites Section 393.1700.1(8), RSMo, which includes various taxes within the definition of "Financing Costs." Again, the costs in question are qualified extraordinary costs, not financing costs.

Y. Section 393.1700.2(3)(c)m calls for special treatment of ADIT, but only for energy transition costs and qualified extraordinary expenses that include retired or abandoned facility costs. Those provision do not apply to Winter Storm Uri costs.

Z. Section 393.1700.2(3)(c)k, RSMo. requires that this order provide for a reconciliation process that would require Liberty to account for any potential tax benefits that may lower its actual securitized utility tariff costs associated with Winter Storm Uri through a future rate case.

Decision

Public Counsel's proposal that income tax deductions for Winter Storm Uri costs be disallowed from the costs to be securitized is not supported by the facts or the law, and the Commission will not make that disallowance.

The Commission's finding in paragraph 53, "Public Counsel incorrectly asserts that the proceeds Liberty will receive from the securitization bonds are not taxable, so the company will be compensated, yet still enjoy a tax break for the loss," is unsupported by the record and, therefore, arbitrary and capricious, and unreasonable. Contrary to the Commission's finding, all parties agreed that, like any other debt proceeds, the bond proceeds Liberty receives are not taxable. They also agreed that the amounts Liberty's customers pay in bond charges that Liberty receives are taxable income to Liberty. Liberty witness Charlotte Emery created confusion on these topics of bond proceeds and charge revenues by her prefiled surrebuttal testimony, "The

Company will pay taxes on the proceeds from the issuance of the securitization bonds,”²

When Staff attorney Curtis Stokes queried her about this testimony during the hearing, she testified:³

Q. Okay. Now, you say in your surrebuttal in that case at page 16, that the company will pay taxes on the proceeds from the issuance of the securitization bonds; is that correct?

A. What row on page 16?

Q. Rows 11 through 12. So when you say when -- the company will pay taxes on the proceeds, you don't mean that the proceeds from the bond issuance; correct?

A. It is my understanding that it's based on the -- the payments received from the customers that we would pay taxes on.

Q. And that would be the payments that the ratepayers pay over time through the securitization charges; correct?

A. Yes.

Q. Okay. So -- so once -- once the special purpose entity sells the bonds and Liberty gets -- gets the proceeds from those bonds, it doesn't pay taxes immediately on that immediate hundred million, 200 million plus --

A. That's what I understand.

Public Counsel witness Riley’s testimony “that the proceeds Liberty will receive from the securitization bonds are not taxable” is correct, not incorrect as the Commission erroneously states and, the Commission’s reliance on that erroneous finding for its decision not to include Liberty’s Storm Uri income tax deductions as offsets to the amounts it included as “qualified extraordinary costs,” is unreasonable.

Further, as the Legislature’s explicit inclusion of income tax benefits as offsets to pretax costs in the definition of energy transition costs indicates, and the common sense of

² Ex. 8, Liberty witness Emery surrebuttal, p. 16, ll. 11-12.

³ Tr. 2:141.

collecting all of the impacts of Winter Storm Uri when deciding what amount to allow to be securitized by bonds rather than splitting them into cost impacts included in the bond amount (increasing the amount Liberty receives immediately in bond proceeds) and offsetting benefit impacts for consideration for future rates (flowing them to Liberty's customers in the future, if ever), it is unreasonable for the Commission to allow Liberty to recover through bond proceeds more than its direct financial impacts from Storm Uri, *i.e.*, more than 95% of the net of its fuel and purchased power costs less SPP market revenues, associated litigation costs, less tax benefits and extraordinary customer revenues (**Issue 2)E**)).

Riverton 11 Revenues

3. Third, the Commission's decision that it was prudent for Liberty not to prepare and operate Riverton Unit 11 during Winter Storm Uri to generate electricity from the maximum fuel oil that could be stored at Riverton is unreasonable. In reaching its decision that Liberty was prudent the Commission unreasonably concluded that Public Counsel's argument is an extension of Staff's tuning argument when it is not. Public Counsel's argument is that, regardless of tuning, Liberty should, as it did with its generating units that can operate on fuel oil sited at Energy Center and State Line, maximize the amount of fuel oil available to Riverton Unit 11 on site and warm that fuel oil so that it would ignite and operate the combustion turbine. The Commission's rationale appears in the Commission's *Financing Order* under **Issue 2)F**) "**Should Liberty's recovery reflect an offset based on revenues that Liberty's Riverton 11 unit should have generated during Winter Storm Uri, and, if so, how much?**," where the Commission made the following findings and conclusions found on pages 27 and 30, respectively, of its *Financing Order*: "The disallowance proposed by Staff and Public Counsel challenges the prudence of

Liberty's decision not to tune Riverton Unit 11 to operate at the extremely cold temperatures experienced during Winter Storm Uri," and "Public Counsel's argument that Liberty was imprudent in not ensuring that its fuel oil tanks at Riverton were full before Winter Storm Uri is an extension of Staff's argument that Liberty was imprudent in failing to tune Riverton Unit 11 to operate in winter weather conditions. Since Staff's argument fails, Public Counsel's extension of that argument must also fail and are neither supported by the record nor by Public Counsel's argument and, therefore, are arbitrary and capricious, and unreasonable."

As Liberty witness Dr. Mushimba testified, tuning a combustion turbine is a process of optimizing the fuel/air mixture to optimize the heat rate of the turbine at a given ambient operating condition and subject to any emissions constraints.⁴ His best explanation from page 193 of the transcript follows:

Tuning is -- is essentially something that you do to model the behavior of your engine during certain conditions. You want to get the maximum generation capacity with minimal impact such as emission. So it's an entire process, technical engineering process of looking at oxygen fuel ratio and mixing with ignition for optimum combustion dynamics and to get your most output at a given temperature with many more emissions from the combustion process. It's recommended when conditions drastically change, and you want to operate in the best range possible.

Public Counsel did not, and does not, argue that Liberty was imprudent for not tuning Riverton Unit 11 to optimize its operation at the ambient conditions of Winter Storm Uri, or any other conditions. As Public Counsel stated at pages 11-13 in its initial brief, Dr. Mushimba testified that Liberty could not start Riverton 11 on No. 2 diesel fuel because it was too cold and Liberty did not have power to warm the fuel. In particular, Dr. Mushimba testified,

Q. Dr. Mushimba, you testified that -- let's see. Because of the temperature, it was very difficult to get diesel -- number [2] diesel to ignite; do you recall that in your testimony?

A. Yes, sir.

Q. My experience is that -- with [diesel] engines that a lot of times you do an additive, something like either or some other combustible hydrocarbon to get things going before

⁴ Tr. 3:189-90; 193.

you move forward with your less volatile fuel. Does -- does Riverton 11 or 10 either one have that capability

A. According to the materials data sheet that we have on the number two diesel that we use as backup, it measures fuel oil and under the temperatures that Riverton 10 operates, the range operates, the Winter Storm Uri was such a unique event that, that happened and the events that subsequently, you know, unfolded were unforeseen because of how just aggressive and unique that -- that event was. In our operations manuals, it calls for some type of heating system to be -- to be -- to be utilized, but the heating system would be fired from available, you know, electricity which during the system when everything was shutting down and natural gas was shut down, and you know, everything was really, for lack of a better word, falling around us because of our extreme conditions where the heating system would not have worked, so that's what we found ourselves against.

Q. So just to make sure I understand your testimony, there -- there wasn't any, I guess, procedure for using an alternative fuel for the diesel to get things heated up and running. The procedure you have in place is to heat the equipment, so that -- the diesel, then, is, I guess, reaches a temperature where it will ignite; is that correct?

A. Yes.

* * * *

Q. Was the issue at the plant getting the fuel into the unit?

A. It's -- the -- the issues where we failed to ignite certainly had to do with the temperature being very cold, subzero, very heavy, the -- the emergent oil being very cold, discussed issues, and flow issues, and when we tried to ignite failure to ignite as a result.

Q. I've heard the term easel gelling before. Was that described what occurred at the plant? Are you familiar with that term?

A. I'm not familiar.

Q. Well, you mentioned -- discuss, just how inaudible) the diesel fuel get --

A. Yeah.

Q. Sorry, diesel. Fuel oil?

A. Yeah. Number two fuel oil gets impacted by the -- the temperature and that was certainly not ideal to operation temperature for it.

(Tr. 3:190-; 200-201)

Contrary to the Commission's descriptions, Public Counsel's argument is that Liberty was imprudent for not maximizing its fuel oil storage at Riverton and not having or acquiring the means to warm that fuel oil during Winter Storm Uri so that it could run that unit just as it ran its dual fuel units—Stateline 1, and Energy Center 1, 2, 3, & 4 (Ex. 9C, Liberty witness Olsen Direct, Sch. JO-3, p. 17 of 114). If it had run, even at less than optimal efficiency, at the SPP market prices

during Winter Storm Uri, it would have been cost effective for Liberty to run Riverton Unit 11 during Winter Storm Uri.

Liberty Resource Planning & Storm Costs

4. Fourth, the Commission’s decision that Liberty prudently planned its resources is unreasonable. The Commission’s rationale appears in the Commission’s *Financing Order* under **Issue 2)G) “Should Liberty’s recovery reflect a disallowance based on Liberty’s resource planning?”** where the Commission states, “Public Counsel [alleges] that Liberty imprudently failed to plan to secure and retain sufficient capacity that it controls to meet the needs of its customers independent of its membership in, and purchases from, SPP,” and, “But that fact [[“if Liberty had more capacity available to sell into the SPP market during Winter Storm Uri, it could have earned enough from those sales to offset the fuel costs that it now seeks to securitize”] is entirely based on perfect hindsight.”

Again the Commission has misunderstood Public Counsel’s position. Public Counsel did not argue that Liberty should ignore the SPP markets when resource planning. Public Counsel argued that the SPP markets are but one of the number of supply-side resources it must consider when resource planning. What is sold into the SPP market and how much of what is sold into that market is required to serve the native loads of entities selling into that market are all factors that affect the reliability of and prices in that market. Ignoring the Commission’s concerning error of confusing capacity and energy, hindsight is not required to recognize that the more energy a load serving utility sells into the SPP market when prices in that market far exceed the cost of creating that energy, the more revenues it will receive from the SPP market to offset against what it must purchase in those markets to supply electricity to its customers (load), potentially even exceeding those purchases. As this Commission is aware, Evergy Metro Inc. received more revenues than

its purchases for Winter Storm Uri (See March 16, 2022, Report and Order in Case No. ER-2022-0025). While Public Counsel did not identify a specific level of reliably dispatchable resources Liberty required in its resource portfolio for it to have a prudent mix of supply-side resources to serve its customers, the magnitude of the harm to its customers from its imprudent resource planning is starkly shown by the about \$193 million of net fuel and purchased power costs Liberty incurred during the about ten days of Winter Storm Uri demonstrates the imprudence of Liberty's resource planning, and the stark unreasonableness of the Commission's decision on this issue.

Liberty Resource Planning & Asbury

5. Fifth, the Commission's decision that Liberty reasonably and prudently retired Asbury when it did so is unreasonable. The Commission's rationale appears in the Commission's *Financing Order* under **Issue 3)E) "Was it reasonable and prudent for Liberty to retire Asbury?"**, where the Commission mischaracterizes Public Counsel's argument on page 48 of its *Financing Order* as follows:

The prudence of Liberty's decision to retire Asbury is challenged only by Public Counsel. Public Counsel argues in broad terms that Liberty deliberately chose to make Asbury uncompetitive in the SPP energy marketplace so that it could justify the building of what it describes as competing wind generation resources in order to pump up the utility's rate base. In addition, Public Counsel, largely relying on hindsight, contends that Liberty imprudently failed to account for the need for reliably dispatched generation in a Winter Storm Uri type situation. Neither argument is supported by the evidence in the record.

And it concluded, "Based on the evidence that is in the record, the Commission deems Liberty's decision to retire Asbury when it did to be reasonable and prudent."

To the extent the Commission's conclusion that Liberty's decision to retire Asbury when it did is reasonable and prudent is unreasonable to the extent it is affected by its misunderstanding of Public Counsel's argument regarding Asbury. Public Counsel's argument is that Liberty did not give sufficient weight to the importance of reliably dispatchable supply-side resources.

Instead, after a short five years after doubling its investment in Asbury, Liberty chose to shut Asbury down despite the fact that Asbury was a highly reliably dispatchable supply-side resource where Liberty maintained a 60-days' burn supply of fuel on site. Further, Liberty has continually sought not only for its customers to continue to pay the cost of that no longer used and useful investment, but also to pay the cost of the wind projects it chose to add to its supply-side resources. Public Counsel did not anticipate an extraordinary event such as Winter Storm Uri, but that storm demonstrated the harm from the imprudence of not having sufficient reliably dispatchable supply-side resources such as Asbury. Had Liberty replaced Asbury with some other reliably dispatchable supply-side resource, this would not be a Public Counsel issue.

Asbury Labor Costs Collected from Customers

6. Sixth, the Commission's decision not to offset Liberty's "pretax costs" for Asbury with the amounts that Liberty's customers paid in their rates for labor at Asbury that Liberty did not incur is both unlawful and unreasonable. The Commission's rationale appears in the Commission's *Financing Order* under **Issue 3)O) "Should Liberty's recovery reflect a disallowance for labor at Asbury?"** where the Commission concludes on page 65 of its *Financing Order*, "But those costs were still used to provide service to those ratepayers through other operations of Liberty." That conclusion is not supported by the record. The costs to which the Commission refers are the amounts that Liberty's customers paid in the rates that the Commission ordered in Liberty's 2019 general rate case, Case No. ER-2019-0374, for labor to operate Asbury. In that case, although Liberty last operated Asbury December 12, 2019, and Liberty was not incurring labor cost to operate Asbury, the Commission treated Asbury as if it were operating when developing the revenue requirement upon which it designed Liberty's rates. When doing so, the Commission imputed into Liberty's annual revenue requirement a specific

amount of labor cost to operate Asbury and ordered Liberty to track its actual Asbury labor costs against the amount it imputed—part of its AAO in that case. That employees may have changed positions from working at Asbury to other responsibilities does not mean that ratepayers were not already funding those positions. If the purpose of the Asbury AAO was to preserve costs and revenues for future consideration, then to now ignore the labor costs for operating Asbury included in that AAO in recognition that Liberty was not incurring them defies logic and is neither lawful nor reasonable.

Wherefore, the Office of the Public Counsel applies to the Commission to set aside its August 18, 2022, *Financing Order* and rehear the foregoing issues.

Respectfully,

/s/ Nathan Williams

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 26th day of August 2022.

/s/ Nathan Williams